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Federal Communications Commission
Washington, D.C. 20554

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DISPATCH

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In the Matter of)	MM DOCKET NO. 96-209
)	
MORGAN MEDIA, INC.)	
)	
Order to Show Cause Why the)	
License for Station WAUB(AM))	
in Auburn, New York Should)	
Not Be Revoked)	

Appearances

Howard J. Braun, Esquire and Shelley Sadowski, Esquire on behalf of Morgan Media, Inc.; Norman Goldstein, Chief, Complaints and Political Programming Branch and James W. Shook, Attorney, on behalf of the Chief, Mass Media Bureau

SUMMARY DECISION OF ADMINISTRATIVE LAW JUDGE RICHARD L. SIPPEL

Issued: March 27, 1997

Released: March 31, 1997

PRELIMINARY STATEMENT

1. This case was set for hearing by Order To Show Cause And Hearing Designation Order ("HDO") DA 96-1681, released October 11, 1996, and published at 11 F.C.C. Rcd 12815 (1996). By delegated authority, the Assistant Chief, Audio Services Division, Mass Media Bureau ("Bureau") placed in hearing the license of Station WAUB(AM), Auburn, New York, held by Morgan Media, Inc. ("Morgan") and required Morgan to show cause why the license should not be revoked on the following issues:

- (a) Whether Morgan Media, Inc. has the capability and intent to expeditiously resume broadcast operations of WAUB(AM) consistent with the Commission's Rules.

- (b) Whether Morgan Media, Inc. has violated Sections 73.1740 and/or 73.1750 of the Commission's Rules.
- (c) Whether, in light of the evidence adduced pursuant to the foregoing issues, Morgan Media, Inc. is qualified to be and remain the licensee of Station WAUB(AM).

2. Station WAUB(AM) was off the air for one year. As of the issuance of the HDO, there had been no demonstration or determination that the failure to resume broadcasting was for causes that were beyond the licensee's control or that the broadcast operations can be resumed expeditiously. Now it appears that the station was returned to the air on February 7, 1997. Therefore, the license did not terminate by operation of law.¹

3. On March 14, 1997, Morgan Media, Inc. ("Morgan") filed a Motion For Summary Decision. The Mass Media Bureau ("Bureau") filed Comments In Support Of Motion For Summary Decision on March 25, 1997. The submissions of the parties on the designated issues are considered herein on their merits and all issues are resolved in favor of Morgan.

FINDINGS OF FACT

4. By letter dated February 6, 1997, the Bureau granted Morgan a Special Temporary Authority ("STA") to resume operations of Station WAUB(AM) with parameters at variance and/or reduced power while maintaining the monitor points within authorized limits. In accordance with the STA and pursuant to a Time Brokerage Agreement ("TBA") between Morgan and Auburn Broadcasting, Inc. ("Auburn"), Station WAUB(AM) resumed operations on February 7, 1997. The Commission was notified forthwith. On March 7, 1997, Morgan and Auburn filed an application (FCC Form 314) for consent to the assignment of license of Station WAUB(AM) from Morgan to Auburn.²

¹ Section 403(1) of the Telecommunications Act of 1996 [47 U.S.C. §312(g)] provides for the automatic expiration of licenses if a broadcast station fails to transmit signals for any consecutive 12 month period. The relevant period of the silence is that of the station and not that of the licensee or facility. Special temporary authorities to remain silent or other such transactions will not toll or extend the 12 month period. Nor can the Commission prevent automatic expiration of a license by waiver. Order FCC 96-218, released May 17, 1996, published at 61 Fed. Reg. 28,766 (June 6, 1996).

² The Presiding Judge takes official notice of the terms of the Asset Purchase Agreement between Morgan and Auburn, a copy of which was filed with the Form 314 assignment application.

5. According to the unchallenged declarations of Richard E. Morgan, President of Morgan, and George W. Kimble, President of Auburn, Station WAUB(AM) resumed its operations on February 7, 1997. It is contemplated by Morgan and Auburn that the Station will continue to operate under the TBA until the parties consummate an assignment of the license pursuant to prior Commission consent. Following consummation of the assignment of the license, it is contemplated and expected that Station WAUB (AM) will continue to operate for the foreseeable future under the ownership of Auburn.

6. The Morgan Declaration establishes that on February 9, 1996, the Bureau granted Morgan temporary silent authority for Station WAUB(AM) through August 9, 1996. Because of financial difficulties, Morgan was at that time without FCC legal counsel. Also, Morgan was directing its full time and attention toward locating a buyer for the Station. Unfortunately, Morgan had neglected to request an extension of temporary silent authority before its expiration on August 9, 1996. Less than two months later, and without making any inquiry of Morgan, the Bureau summarily adopted the HDO. Morgan candidly admits to a technical violation of a Commission Rule requiring uninterrupted broadcasting [47 C.F.R. §73.1740] due to oversight. Since the technical violation of the Rule persisted for only two months before the issuance of the HDO, it amounted to only a de minimis failure to abide by the Commission Rules concerning silent stations. Under such circumstances, such a minor technical violation of §73.1740 does not warrant the draconian sanction of disqualification of Morgan or the revocation of the Station's broadcasting license.

7. The HDO further alleges that Morgan may also have violated §73.1750 of the Rules which requires notification to the Commission before a station is allowed to become silent. However, Morgan has established, without challenge from the Bureau, that at no time prior to the issuance of the HDO did Morgan intend to permanently discontinue operating the Station. There is substantial evidence of that conclusion found in a letter dated October 5, 1995, from Morgan's President to the Commission staff, wherein Morgan acknowledged the business necessity for new ownership and duly requested an opportunity to search for and find a buyer for the Station. Morgan's clear intent has been to find a buyer who was ready, willing and able to purchase and operate Station WAUB(AM) so that broadcast operations would not be permanently foregone in the Auburn community. Morgan's successful search for a buyer, the return of the Station to the air, and the submission of an assignment application indicate that Morgan never intended to permanently discontinue operation of Station WAUB(AM). Under such circumstances, there is no substantial question as to whether Morgan violated §73.1750 of the Rules. That conclusion is supported by the Bureau. Accordingly, there is no question of material fact to be tried at a hearing with respect to the second issue.

CONCLUSIONS OF LAW

8. The relevant Commission Rules relating to the licensee's duty to continuously remain on the air and to notify the Commission before any discontinuance of operation provide as follows:

§73.1740(a)(4)

In the event that causes beyond the control of a licensee make it impossible to adhere to the operating schedule of this section or to continue operating, the station may limit or discontinue operation for a period of not more than 30 days without further authority from the FCC. Notification must be sent to the FCC in Washington, D.C. not later than the 10th day of limited or discontinued operation. During such period, the licensee shall continue to adhere to the requirements in the station license pertaining to the lighting of antenna structures. In the event normal operation is restored prior to the expiration of the 30 day period, the licensee will so notify the FCC of this date. If the causes beyond the control the licensee make it impossible to comply with the allowed period, an informal written request shall be made to the FCC no later than the 30th day for such additional time as may be deemed necessary.

§73.1750

The licensee of each station shall notify the FCC in Washington, D.C. of permanent discontinuance of operation at least two days before operation is discontinued. Immediately after discontinuance of operation, the licensee shall forward the station license and other instruments of authorization to the FCC, Washington, D.C. for cancellation.

9. Under the Commission's Rules, Summary Decision is warranted only where it is shown that there is no genuine issue of material fact remaining for determination at a hearing. In addition, it must be established that the truth is clear, that the basic facts are undisputed, and that the parties are not in disagreement regarding material factual inferences that may be drawn from the facts as to which there are no genuine issues. Big Country Radio, Inc., 50 F.C.C. Rcd 967 (Review Bd 1975).

10. It is concluded that in light of the foregoing, no genuine issue of material fact exists relating to Morgan's intent and present ability to resume broadcasting. That issue became moot with the Station's return to the air. Morgan has clearly demonstrated that since the issuance of the HDO, it had both the capability and the intent to resume Station operations expeditiously. As a result of Morgan's efforts and resolve, together with the Bureau's expedited review, Station WAUB(AM) is now operating, the Station will continue to operate under the TBA and, thereafter, will continue to operate for the foreseeable future under the ownership of Auburn.

11. The ultimate issue for which a summary decision is requested is whether, under the circumstances, Morgan is qualified to be and remain the licensee of Station WAUB(AM). The applicable Commission Rule required Morgan to submit an informal written request to remain silent when it was unable to continue Station operations. 47 C.F.R. §73.1740. Morgan was also required to notify the Commission of discontinuance of the Station's operations. 47 C.F.R. §73.1750.³ However, the resumption of broadcasting before February 9, 1997, pursuant to the TBA and the submission of the assignment application override the minor violations of §73.1740 and §73.1750 and establish Morgan's qualifications. Even if such violations are viewed as willful or repeated, the time period was brief. When the violations are considered in light of the Station's return to the air and the intense efforts on the part of Morgan to do so, revocation is not justified here.

ULTIMATE CONCLUSION

12. Morgan resumed broadcasting on Station WAUB(AM) on February 7, 1997, and its TBA with Auburn ensures continued broadcasting. It is concluded that the violations alleged under the HDO were merely technical and not serious enough to disqualify and warrant revocation. Under the facts and circumstances presented by the pleadings and related papers, it is concluded that the public interest, convenience and necessity will be served by granting summary decision in favor of Morgan and by terminating this proceeding.

ORDER

Accordingly, IT IS ORDERED that the Motion For Summary Decision filed on March 14, 1997, by Morgan Media, Inc. IS GRANTED.

³ The evidence shows that Morgan did not intend that the station be permanently silent and, therefore, there is no basis to conclude that Morgan had unlawfully failed to return the license for cancellation. *Id.*

IT IS FURTHER ORDERED that the issues set under the Order To Show Cause And Hearing Designation Order (DA 96-1681) ARE RESOLVED in favor of Morgan Media, Inc.

IT IS FURTHER ORDERED that unless an appeal is taken from this Summary Decision, or unless it is reviewed by the Commission on its own motion, this case IS TERMINATED in favor of Morgan Media, Inc.⁴

FEDERAL COMMUNICATIONS COMMISSION

Richard L. Sippel
Administrative Law Judge

⁴ In the event that exceptions are not filed within 30 days of the release of this Summary Decision, and provided that the Commission does not review the case on its own motion under 47 C.F.R. §1.251(e) and 47 C.F.R. §1.276, this Summary Decision will become effective 50 days after its public release pursuant to 47 C.F.R. §1.276(d).